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No. 80-1879

In the Supreme Court of the United States

OCTOBER TERM, 1980

GREGORY FREEMAN, PETITIONER

vs.

STATE OF OHIO, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO RESPONDENT'S BRIEF IN OPPOSITION

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Now comes the Respondent, State of Ohio, by and through David O. Bauer and James D. Bates, Assistant Prosecuting Attorneys of Lucas County, Ohio and respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the Supreme Court of Ohio.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE PETITIONER HAS FAILED TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

The Supreme Court of the United States, pursuant to 28 U.S.C. §1257 (3) has jurisdiction to review cases in State Courts by way of certiorari in three situations: (1) where the validity of a Federal treaty or statute is drawn in question; (2) where the validity of a State statute is drawn in question on the ground of its being repugnant to Federal law; and (3) where a title, right, privilege, or immunity is set up or claimed "under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States".

It is fundamental to the jurisdiction of the Supreme Court pursuant to §1257 that there must be presented a substantial Federal question and that the question has been properly raised in the State Court proceeding. The Federal question presented must be more than a

formal one and must not be so devoid of merit as to be frivolous. Nor can it be foreclosed by prior decisions of the Supreme Court so that there is no real controversy. *Equitable Life Assurance Society v. Brown,* 187 U.S. 308 (1902). Any Federal issue not meeting these standards is considered insubstantial and is cause for dismissal of an appeal or a denial of a petition for writ of certiorari. *Zucht v. King,* 260 U.S. 170 (1922); *Palmer Oil Corp. v. Amerada Corp.,* 343 U.S. 390 (1951).

The issues raised by the Petitioner fail to meet the requirement of a substantial Federal question. There is no new or novel constitutional question presented and the case will affect few individuals, if any, other than the Petitioner.

II. THE PETITION FOR CERTIORARI SHOULD BE DENIED FOR THERE IS AN ABSENCE OF A LEGAL CONTROVERSY.

The Supreme Court generally will not grant certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved. In *United States v. Johnson,* 268 U.S. 220, 227 (1924), the Court held, "We do not grant certiorari to review evidence and discuss specific facts". This policy has most often been followed in cases such as this one where two separate appellate courts have concurred regarding the sufficiency of the facts.

Here, Petitioner's primary contention is that the facts herein do not justify the lower court decisions in view of this Court's pronouncements in *Terry v. Ohio,* 392 U.S. 1 (1968) and subsequent cases. As stated in *Graver Mfg. Co. v. Linde Co.,* 336 U.S. 271 (1948):

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error.

Review will be accepted and facts re-examined only when a case acquires importance for some other reason. In light of the above, it is apparent that here there is an absence of a legal controversy of importance.

The concept of importance relates primarily to the importance of the issues "to the public as distinguished from importance to the particular party involved". *Rice v. Sioux City Cemetery,* 349 U.S. 70, 79 (1955). In the Petition presently before the Court, the issues are not sufficiently important to the public or to other persons who may be affected by the case to warrant granting certiorari to the United States Supreme Court.

III. THE ISSUE PRESENTED BY THE PETITION WAS FULLY AND CORRECTLY DECIDED BY THE STATE COURT.

The record reveals that Officer Robert Bratton was on routine patrol in the early morning hours, checking the general area of a Quality Inn. This was known as a high crime area and the Officer was aware of the high frequency of theft and criminal damaging.

That night, on two separate occasions, within fifteen minutes, the Officer observed Petitioner sitting in a parked car with the engine and lights turned off. When Petitioner drove away the Officer initiated the stop that resulted in the seizure of the gun.

The issue then is confined to the propriety of the stop itself.

The appropriate test to be applied herein was enunciated by this Court in *Terry v. Ohio*, 392 U.S. 1 (1968); which stated:

> And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rationale inferences from those facts, reasonably warrant that intrusion.***would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? Cf. *Carroll v. United States*, 267 U.S. 132 (1925); *Beck v. Ohio*, 379 U.S. 89, 96-97 (1964).

The Supreme Court of Ohio applied the *Terry* doctrine to the facts herein and concluded that there were "specific and articulable" facts which reasonably warranted the stop of Petitioner's vehicle.

Other State and lower Federal courts have utilized the decision in *Terry* to sustain similar stops and subsequent searches. See, *United States v. Magda*, 547 F. 2d 756 (2nd Cir., 1976), cert. den. 434 U.S. 878 (1977); *Commonwealth v. Almeida*, 366 N.E. 2d 756 (Mass. 1977); *People v. Domaska*, 273 N.W. 2d 58 (Mich., 1978); *United States v. Constantine*, 567 F. 2d 266 (4th Cir., 1977).

Delaware v. Prouse, 440 U.S. 648 (1979), involved a purely random traffic stop where the officer had no reason to stop the defendant. This Court's decision was limited to situations where the stop was made without any basis. The Court stated:

> Accordingly, we hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment . . . We hold

only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers. *Delaware*, 59 L. Ed. 2d at 673.

In *Brown v. Texas*, 443 U.S. 47 (1979), the facts were also distinguishable from the present case. In *Brown*, two police officers while on patrol, saw the defendant and another man walking away from each other in an area noted for heavy drug traffic. They stopped and asked the defendant to identify himself and tell them what he was doing. One officer indicated that they stopped the defendant because the situation looked suspicious, and they had never seen him in that area before. The Court held that there was no basis for suspecting the defendant of misconduct, noting that the officer merely testified it looked suspicious, "but he was unable to point to any facts supporting that conclusion". Id. at 2641.

Neither of these cases apply to Petitioner. The stop was not at random, nor did the officer lack the articulable facts to warrant the Petitioner's stop. In the present case, Officer Bratton indicated his reason for stopping Petitioner. He said it was late at night and he observed a man in a parked car with the motor and lights off. The man remained in the parking lot in this fashion for an unusually long period of time. Furthermore, Bratton knew that this area had recently been inundated with crime. These were sufficient facts to give rise to a legitimate suspicion, and it would have been poor police work indeed to have failed to stop Petitioner and investigate further.

Thus, all of the post *Terry* cases cited by Petitioner are clearly not applicable on their facts. The Supreme Court of Ohio applied the proper test when it relied upon *Terry*. It set forth four (4) specific and articulable facts that were known to the officer and which rendered the stop constitutionally permissible. (See opinion of the Supreme Court of Ohio, p. 295).

As was stated by this Court in *Adams v. Williams*, 407 U.S. 143 (1972):

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

The Supreme Court of Ohio correctly applied the pertinent law and the case was therefore properly decided.

IV. THE DECISION APPEALED FROM IS NOT IN CONFLICT WITH DECISIONS OF COURTS FROM OTHER JURISDICTIONS.

This Court's decisions in *Delaware v. Prouse*, 440 U.S. 648 (1979), and *Brown v. Texas*, 443 U.S. 47 (1979), were merely clarifications of the doctrine of *Terry v. Ohio, supra.* As such, they simply illustrated two examples of fact patterns that were not sufficient to warrant an intrusion under *Terry.*

All of the decisions cited by Petitioner as being in conflict with that of the Supreme Court of Ohio are varying interpretations of fact patterns and their applicability to the *Terry* standard. Each hinges upon the individual court's perception of the facts of a given case and all followed the rule of *Terry* or the cases of *Prouse* or *Brown* which were predicated upon *Terry.* The Supreme Court of Ohio followed the same rule and is thus not in conflict with the other jurisdictions in terms of the legal standard to be applied.

CONCLUSION

For all of the reasons set forth above, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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LUCAS COUNTY, OHIO

by

David O. Bauer,
Assistant Prosecuting Attorney

and

James D. Bates,
Assistant Prosecuting Attorney

CERTIFICATION

This is to certify that a copy of the foregoing was sent via U.S. Mail this 2nd day of June, 1981 to John F. Potts, at 4334 W. Central Ave., Suite 238, Toledo, OH, 43615; Ralph DeNune, III, 4334 Central Ave., Suite 238, Toledo, OH, 43615; and Paul L. Geller, at 520 Spitzer Bldg., Toledo, OH, 43604.

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